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COMMON-LAW PLEADING - STILL SURVIVES AS THE BASIS OF MODERN REMEDIAL LAW

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COMMON-LAW PLEADING, the ancient methodology used for bringing legal issues before the courts of England, is as old as the Anglo-Saxon legal system and as new as yesterday's cases before the trial and appellate courts of the United States. First formed and cultivated as a science in the reign of Edward I (1272-1306)[1] and further

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[1] See comment in STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, c. II, 147 (3d Am. ed. by Tyler, Washington, D. C. 1893). Cf. The Statement of SIR MATHEW HALE, in THE HISTORY OF THE COMMON LAW, c. VIII, 173 (4th ed. Dublin, 1792).

In general on the subject of common-law pleading, see the following:

Treatises: GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNIT ANGLIAE (1187-1189) [New edition edited by George E. Woodbine, 4 vols., (New Haven, 1932)]; BRACTON, DE LEGIBUS AND CONSUETUDINIBUS ANGLIAE (1250-1258); CASUS PLACITORUM, a collection of decisions of Judges, all of whom lived before 1260; according to Holdsworth, and which in style and subject matter anticipated the Year Books; FET ASSAVER (before 1267), a tract on procedure probably by Hengham, and reported in WOODBINE, FOUR THIRTEENTH CENTURY LAW TRACTS (New Haven, 1910); CADIT ASSISA (1267 or after), a summary of that part of Bracton's Treatise dealing with the Assize of Mort d'Ancestor [new edition by Sir Travers Twiss, London 1878-1883]; HENGHAM, MAGNA (1270-1275), based on Bracton, and containing information on the rules of pleading and procedure in the real actions; HENGHAM, PARVA (1285 or after), containing instruction as to pleading and procedure in certain real actions; BRITTON, ANCIENT PLEAS OF THE CROWN (Trans. by F. M. Nichols, 1290); FLETA, AN EPITOME OF BRITTON (1290); ARTICULI AD NOVAS NARRATIONES (1326-1340), consisting for most part precedents of pleading; REGISTER OF WRITS (1326-1377); PYNSON'S BOOK OF ENTRIES (1510); FITZHERBERT, NATURA BREVIUM (1534), a selection of writs together with a commentary; RASTELL'S ENTRIES (1564); THELOALL, DIGEST OF ORIGINAL WRITS AND THINGS CONCERNING THEM (1579), a most orderly treatise on procedure grounded on the Year Books and printed at the end of the 1687 edition of the REGISTER OF WRITS; COKE, BOOK OF ENTRIES (1614); POWELL, ATTORNEY'S ACADEMY (1623); EUER, DOCTRINA PLACITANDI, or THE ART AND SCIENCE OF PLEADING (1640); COKE, DECLARATIONS AND PLEADINGS contained in his eleven Books of Reports (1650); ASTON, PLACITA LATINE REDIVIVA: A BOOK OF ENTRIES (1661-1673); BROWNE, FORMULAE BENE PLACITANDI. A BOOK OF ENTRIES (1671, 1675); LIBER PLACITANDI (London, 1674), a book of special pleadings containing precedents; VIVIAN, THE EXACT PLEADER; A BOOK OF ENTRIES (1684); CLIFT, A NEW BOOK OF DECLARATIONS, PLEADINGS, VERDICTS, JUDGMENTS, AND JUDICIAL WRITS, WITH THE ENTRIES THEREUPON (1703, 1719); LILLY, A COLLECTION OF MODERN ENTRIES (1723,

an English edition appeared in 1741); EUER, A SYSTEM OF PLEADING, including translation of the DOCTRINA PLACITANDI, OR THE ART AND SCIENCE OF PLEADING (Dublin, 1791); AMERICAN PRECEDENTS AND DECLARATIONS (Boston, 1802); WENTWORTH, A COMPLETE SYSTEM OF PLEADINGS (London, 1797-99); STORY, PLEADINGS IN CIVIL ACTIONS (Salem, 1805); LAWES, ELEMENTARY TREATISE ON PLEADING (London, 1806) [1st Amer. from 1st London ed. (Portsmouth, N. H., 1808)]; BOOTH, THE NATURE AND PRACTICE OF REAL ACTIONS (1st Amer. ed. New York, 1808); LAWES, PRACTICAL TREATISE ON PLEADING (Boston, 1811); HENING, THE AMERICAN PLEADER AND LAWYER'S GUIDE, 2 vols. (New York, 1811); CHITTY, TREATISE ON PLEADING AND PARTIES TO ACTIONS, 2 vols. (2d ed. by Day, New York, 1812); HARRIS, MODERN ENTRIES, 2 vols. (Edited by Evans, Baltimore, 1821); JACKSON, TREATISE ON THE PLEADINGS AND PRACTICE OF REAL ACTIONS (Boston, 1828); SAUNDERS, THE LAW OF PLEADING AND EVIDENCE IN CIVIL ACTIONS (2d Am. ed. Philadelphia, 1831; GOULD, TREATISE ON THE PRINCIPLES OF PLEADINGS IN CIVIL ACTIONS (1832); CHITTY, PRECEDENTS IN PLEADING, 2 vols. (1st Am. ed. Springfield, 1839); TYRWHITT, PLEADING (London, 1846); WILLIAMS, INTRODUCTION TO PLEADING AND PRACTICE (London, 1857); STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS, A VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW (From 2d London ed. by Samuel Tyler, Washington, 1872); CHITTY, TREATISE ON PLEADING AND PARTIES TO ACTIONS, WITH PRECEDENTS AND FORMS (London, 1808, 16th Amer. ed. by J. C. Perkins, Springfield, 1876); EVANS, PLEADING IN CIVIL ACTIONS (2d ed. by William Miller, Chicago, 1879); CHITTY, TREATISE ON PLEADING AND PARTIES TO ACTIONS (16th Am. ed. Springfield, Mass., 1879); HEARD, PRINCIPLES OF CIVIL PLEADING (Boston, 1880); MAITLAND AND BAILDON, THE COURT BARON (London, 1891); SHINN, TREATISE ON PLEADING AND PRACTICE (Chicago, 1892); MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING (1st ed. New York, 1894); STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS (3d Am. ed. by Tyler, Washington, 1895); SHINN, TREATISE ON PLEADING AND PRACTICE, 2 vols. (Chicago, 1896); POE, PLEADING AND PRACTICE IN COURTS OF COMMON LAW (Baltimore, 1897); PERRY, COMMON-LAW PLEADING (Boston, 1897); MARTIN, CIVIL PROCEDURE AT COMMON LAW (St. Paul, 1905); MAITLAND, EQUITY, THE FORMS OF ACTION AT COMMON LAW (Cambridge, 1909); WOODBINE, FOUR THIRTEENTH CENTURY LAW TRACTS [on Pleading] (New Haven, 1910), containing: JUDICIUM ESSONIORUM (1267-1275), a tract on essoins probably also by Hengham; EXCEPTIONS AD CASSANDUM BREVIA (1285) [tract on the writs]; MODUS COMPONENDI BREVIA (1285); CUM SIT NECESSARIUM OR MODUS CASSANDUM BREVIA (1285 or after), [a tract on the writs]; MILLAR, COMMON-LAW PLEADING (Chicago, 1914); PUTERBAUGH, COMMON LAW PLEADING AND PRACTICE IN ILLINOIS (9th ed. by L. D. Puterbaugh, Chicago, 1917); WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (Cambridge, 1921); SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW (New York, 1922); SHIPMAN, HANDBOOK OF COMMON LAW PLEADING (3d ed. Ballantine, St. Paul, 1923); BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS IN ACTIONS IN THE KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE (8th ed. by W. Wyatt-Paine, London, 1924; 9th ed. London, 1935); O'DONNELL, PROCEDURE AND FORMS OF COMMON LAW PLEADING (Washington, D. C., 1934); PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (3d ed. London, 1940; 4th ed. London, 1948); FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW (London, 1949); ODGERS, PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE (1st ed. London, 1891; 3d ed. London, 1897; 4th ed. London, 1900; 5th ed. London, 1903; 6th ed. London, 1906; 7th ed. London, 1912; 14th ed. London, 1952).

Casebooks: AMES, A SELECTION OF CASES ON PLEADING (1st ed. Cambridge, 1875; 2d ed. Cambridge, 1905); SHIPP AND DAISH, CASES ILLUSTRATING COMMON-LAW PLEADING (Chicago, 1903); KEEN, CASES ON PLEADING (Boston, 1905); SUNDERLAND, CASES ON COMMON-LAW PLEADING (Chicago, 1913); LLOYD, CASES ON CIVIL PROCEDURE (Indianapolis, 1915); SCOTT, CASES AND OTHER AUTHORITIES ON CIVIL PROCEDURE (Cambridge, 1915); WHITTIER AND MORGAN, CASES ON COMMON-LAW PLEADING (St. Paul, 1916); COOK AND HINTON, CASES ON PLEADING AT COMMON LAW (Chicago, 1923); REPPY, CASES ON PLEADING AT COMMON LAW (New York, 1926); MAGILL, CASES ON CIVIL PROCEDURE (St. Paul, 1927); LLOYD, CASES ON PLEADING IN ACTIONS AT LAW (Indianapolis, 1927); CLARK, CASES ON COMMON-LAW PLEADING (Cincinnati, 1931);

perfected during the reign of Edward III (1326-1377),[2] it has served each succeeding generation as an effective instrument in the administration of justice, and today is still very much alive, both as an operating system and as a guiding force in the recurring waves of reform designed to correct its real and imagined abuses.

For more than six centuries it was the only method of pleading in the common-law courts of England—King's Bench, Exchequer and Common Pleas—and for two hundred years it was the exclusive procedural device leading to the trial of legal issues in the United States.

It was, however, subject to many defects, due largely to the fact that the entire English procedural system had grown up in a patchwork fashion,[3] while the constantly expanding substantive law was outgrowing the forms of action which gave it birth. In the latter part of the Eighteenth and early part of the Nineteenth Centuries, under the impetus of Bentham's searing criticism of the existing system of law in England, with its courts, its special pleading, and its general atmosphere of delay and administrative inefficiency, these restrictive influences became clear to the people, a demand for reform sprang up and the movement for the improvement of procedure slowly got under way.

The impact of this development, strangely enough, first bore fruit in America with the framing of Livingston's Code[4] of Procedure

KEIGWIN, CASES ON COMMON-LAW PLEADING (1st ed. Rochester, 1926; 2d ed. Rochester, 1934); COOK AND HINTON, CASES ON PLEADING AT COMMON LAW (revision of Part I, Common Law Actions) (Chicago, 1940); ATKINSON, INTRODUCTION TO PLEADING AND PROCEDURE (Columbia, 1940); SCOTT AND SIMPSON, CASES AND OTHER MATERIALS ON JUDICIAL REMEDIES (Cambridge, 1946); SCOTT AND SIMPSON, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE (Boston, 1950); REPPY, INTRODUCTION TO CIVIL PROCEDURE (Buffalo, 1954).

[2] In referring to the improvement in the science of pleading, Sir Edward Coke declared: "In the reign of Edward III [1326-1377] pleadings grew to perfection, both without lameness and curiosity; for then the judges and professors of law were excellently learned, and then knowledge of the law flourished; the serjeants of the law, &c. drew their own pleadings, and therefore [it was] truly said by Justice Thirning, in the reign of Henry IV [1399-1413] that in the time of Edward III the law was in a higher degree than it had been any time before; for before that time the manner of pleading was but feeble, in comparison of that it was afterward in the reign of the same king." 1 COKE, upon LITTLETON, 304 b, Lib. 3, Cap. 9, § 534 (1st Amer. from the 16th European ed. by Francis Hargrave and Charles Butler, Philadelphia, 1812).

[3] "The remedial part of the law resembles a mass of patchwork, made up at intervals and by piece-meal, without any preconceived plan or system, for the purpose of meeting the exigencies of the times by temporary expedients." WALKER'S INTRODUCTION TO AMERICAN LAW, Pt. VI, Lecture XXXV, 569 (4th ed. Boston, 1905).

[4] Louisiana Act of April 10, 1805.

and the Penal Code in 1824, which was never adopted.[5] This was followed in England by the adoption of the Hilary Rules in 1833,[6] and in the United States by the New York Code of Procedure in 1848.[7] Thereafter, in relatively quick succession, the English Parliament enacted the Common Law Procedure Acts of 1852,[8] 1854,[9] and 1860,[10] and the Supreme Court of Judicature Acts of 1873[11] and 1875,[12] now for the most part replaced by the Supreme Court of Judicature (Consolidation) Act of 1925.[13] And in 1938 the Supreme Court of the United States made effective the new Federal Rules of Civil Procedure.[14] In consequence thereof, both at home and abroad,

[5] Livingston's Penal Code authorized by the Act of February 10, 1821, and completed in 1824, was never enacted into law as such by the Legislature of Louisiana.

Edward Livingston was born in 1764 and died in 1836, or about six years after Field began his professional career. A native of New York, and a brother of Chancellor Robert R. Livingston, his Penal Code of Louisiana, which was published in 1824, attracted great attention in England and on the Continent. DAVID DUDLEY FIELD CENTENARY ESSAYS, 19 (Edited by Reppy, New York, 1949).

[6] The Hilary Rules, designed to restore the ancient strict common-law theory as to the scope of the general issue, were promulgated pursuant to the Law Amendment Act, 3 & 4 Wm. IV, c. 42, § 1 (1883).

For the history and effect of the Hilary Rules in England, see article by HOLDSWORTH, *The New Rules of Pleading of the Hilary Term,* 1 Cambridge L. J. 261 (1923); for the history and effect of the Hilary Rules in the several states of the United States, see, REPPY, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practice Acts,* 6 N.Y.U.L.Q. Rev. 95 (1929).

[7] "After careful consideration and amendment by the New York Legislature, the draft [of a proposed code] was enacted into law on April 12, 1848, N. Y. Laws 1848, c. 379, to become effective on July 1 of the same year. Written in the form of a code containing 391 sections, it became known at once as the Code of Procedure or as the Field Code. This title was far too broad in scope as the act related only to a small portion of the adjective law, and expressly retained the old common law or statutory rule where not expressly abolished by the Code." REPPY, THE FIELD CODIFICATION CONCEPT, in the DAVID DUDLEY FIELD CENTENARY ESSAYS, 17, 33-34 (Edited by Reppy, New York, 1949).

[8] 15 & 16 Vict. c. 76.

[9] 17 & 18 Vict. c. 125.

[10] 23 & 24 Vict. c. 126.

[11] 36 & 37 Vict. c. 66.

[12] 37 & 38 Vict. c. 77.

[13] 15 & 16 Geo. V. c. 49.

[14] The Federal Rules were drafted by an Advisory Committee appointed by the Supreme Court under the authority of a federal statute enacted in 1934. Act of June 19, 1934, c. 651, §§ 1, 2; 48 Stat. 1064, 28 U. S. C. §§ 723b, 723c. See, on the earlier phases of the struggle for federal procedural reform, article by SHELTON, *The Reform of Judicial Procedure,* 1 Va. L. Rev. 89 (1913).

For detailed information concerning the adoption, backgrounding and drafting of the Federal Rules of Civil Procedure, see CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, c. I, *History, Systems and Function of Pleading,* 31-39 (2d ed., St. Paul, 1947).

In this connection it should be recalled that progress in the reform of criminal procedure has followed up and to some extent paralleled the reform of the civil procedure which has been under way since 1848. In 1930 the American Law Institute issued its Code of Criminal Procedure, which has subsequently substantially influenced state

the system of pleading as developed at common law, has been modified by judicial decision, changed by statute, or by rule of court, and in some jurisdictions ostensibly swept away in its entirety—so the reformers thought—but subsequent events have cast grave doubts on this conclusion, as the solemn and stubborn fact is that common-law pleading still survives as the basis of our modern remedial law.[15]

Select any individual and you will find that he is what he is today because of what his father and mother were yesterday; he cannot escape his ancestry, but must make his way through life with the physical, mental, moral and spiritual assets with which he was naturally endowed by the union of his parents. It is true that within certain limits he may seem to change his environment, acquire a better training, and contribute more to the community than did his forbears, but any advance or improvement he may make must be done within the limits of his ancestral background. And so it is with institutions such as the law which, after all, are merely the product of joint individual effort. The law is what it is today because of what the law was yesterday; it cannot escape its ancestry, and it, too, must progress against the background of its history. Like the individual, so with the common-law system of procedure, which we all proudly claim as a priceless part of our Anglo-Saxon heritage, we may change, we may add to or take away those parts of the system which have outgrown their usefulness, just as the modern common-law actions superseded the old real actions[16] when they became archaic, but it is no

criminal procedural developments in the several states. In 1941, pursuant to the rule-making authority granted to the Supreme Court by Congress, the Advisory Committee on Rules of Criminal Procedure appointed by the Court, published two Preliminary Drafts, with notes, in its Final Report to the Court in June, 1944. The rules suggested therein were adopted by the Court on December 26, 1944, to become effective three months after the adjournment of Congress, or on March 21, 1946. The Court also gave directions that the rules be reported to Congress in accordance with the terms of the Enabling Act, 323 U. S. 821, 65 S. Ct. XI, note 97 (1944).

See, also, Editorial, *"To Form a More Perfect Union"*, 32 A. B. A. J. 90 (1946); Dession, *The New Federal Rules of Criminal Procedure, Part I,* 55 Yale L. J. 694-714 (1946); *Part II,* 56 Yale L. J. 197-257 (1947).

[15] "While the new rules have abolished the distinctive common law forms, the essential and differentiating rules applicable to pleading as established at common law still survive as a basis of remedial law." MINTURN, J., in Ward v. Huff, 94 N. J. L. 81, 84, 109 A. 287, 288 (1919).

[16] The old real actions fell under one of the heads of Blackstone's famous classification of actions as real, personal and mixed. The real actions were by far the most important during the early developmental period of the common law. Included therein were writs of right proper and writs in the nature of writs of right, such writs, among others, as the writ of right de rationabili parte, the writ of advowson, the writ of dower, the writ of dower under nihil habet, and the writ of quare impedit. These actions were feudal in character and were concerned with disputes over land. Because

more possible in any realistic sense to abolish the system in its entirety, with all its implications for both the past and the future, than it is for an individual to destroy his ancestry, or for mankind to abolish history or civilization.

Infinite damage has been done to the cause of legitimate legal reform, to the cause of legal education, at the expense of litigants, students of law, and the public welfare generally, by proclaiming the concept that all that has gone before in our procedural ancestry should be regarded as obsolete and worthless,[17] and is not to be considered in terms of modern pleading and practice, and in terms of modern legal education. Those who take this limited view have clearly confused the real merits of the common-law system with those portions of the system which were needlessly technical, thus overlooking the salient fact that it had developed many sound and enduring principles of legal procedure. They have also overlooked the fact that there is greater similarity in the essential principles underlying pleading at common law, in equity, under modern codes and practice acts, and even under the new Federal Rules of Civil Procedure now in effect in the federal courts, than is generally realized.[18] More-

of the technicalities required in their control and the length of time involved in carrying their process through, these actions, along with those which fell under the other two heads, were gradually superseded by what are now known as the eleven modern common-law, personal actions, as a result of evolutionary steps in the development of the common law. What had, in effect, long before occurred as a matter of practice, was officially recognized by the REAL PROPERTY LIMITATION ACT OF 1833, 3 & 4 Wm. IV, c. 27, § 36, which swept aside the real and mixed actions, with certain exceptions, effective December 31, 1834.

[17] SIR MONTAGUE CRACKENTHORPE, O.C., in an address to the American Bar Association, in reference to the utility of the study of common-law pleading, stated: "In the hands of those who understood it, the system [of common-law pleading] was infallible in attaining the purpose for which it existed. If all who brought causes to trial had possessed a proper acquaintance with this branch of law and a reasonable mental alertness, it would never have been hinted that pleading was a means of turning the decision of a question from 'the very right of the matter' to immaterial points. But pleaders of inferior and slovenly mental disposition suffered themselves to be misled, deliberately it is to be feared, by their more acute brethren; and the popular mind came to consider the whole system a mere series of traps and pitfalls for the unwary, —an impediment to justice that must be abolished. In truth, even these evils might well have been remedied by allowing free liberty of amendment, and reducing to a moderate sum the costs payable on the grant of such privilege. Those concerned in reform movements, however, often lose sight of their real object in a feverish anxiety to 'cut deep' and at once; and this explains why the system for bringing a cause to trial in convenient and exact form was discarded." Note, *Common Law Pleading,* 10 Harv. L. Rev. 238, 239 (1896).

[18] "There is no rule regulating the substance of pleadings under the codes which is not either taken directly from the older system, or framed by analogy in the application of the same principles. The experience of the past thirty years has demonstrated that the codes have by no means brought about that perfect completeness and simplicity

over, the essential elements of causes of action which must be pleaded have not been abolished by the reformed procedure, nor have the fundamental conceptions common to all systems of procedure as to the manner of making allegations which reveal the contentions of the rival parties, been changed. As Lord Mansfield so well said: "The substantive rules of pleading are founded in strong sense, and in the soundest and clearest logic, and so appear, when well understood and explained, though by being misunderstood and misapplied, they are made use of as instruments of chicane."[19] As a result of such misapplication and chicanery by men who resorted to the technicalities of special pleading to serve their own selfish ends, as a result of the portrayal by its enemies of the system as a mere game of skill, in which the helpless litigant became a pawn in a wilderness of arbitrary

in all forms of legal procedure hoped for and predicted by their supporters, and expected, perhaps, during the earlier years of their adoption." SHIPMAN, CODE PLEADING: THE AID OF THE EARLIER SYSTEMS, 7 Yale L. J. 197 (1898).

"The problems and functions and principles of pleading are essentially the same in all systems, whether at common law, under the code, in equity, or by rule of court." SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING, *Introduction,* 7, 8 (3d ed. by Ballantine, St. Paul, 1923).

"It is believed that, aside from technical and formal requirements, there is no rule regulating the substance of pleadings under the codes which is not either taken directly from the older system, or framed by analogy in the application of the same principles." See 4 STANDARD ENCYCLOPEDIA OF PROCEDURE, *Introduction,* § 11 (Los Angeles & Chicago, 1911).

Thus, in Minnesota, in the case of Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340 (1883), a code complaint which alleged, among other things, that the defendant was indebted to the plaintiff on an account past due, for goods sold and delivered, was held to contain all the allegations necessary to constitute a good indebtedness count in an action of debt at common law, the court remarking that "under that system of pleading it was just as necessary to allege the *facts* as it is under the Code."

In Crump v. Mims, 64 N. C. 768, 771 (1870), Rodman, J., declared: "We take occasion here to suggest to pleaders that the rules of the common law as to pleading, which are only the rules of logic, have not been abolished by The Code. Pleas should not state the evidence, but the facts, which are the conclusions from the evidence, according to their legal effect; and complaints should especially avoid wandering into matter which if traversed would not lead to a decisive issue. It is the object of all pleading to arrive at some single, simple and material issue."

In accord: Parsley v. Nicholson, 65 N. C. 207, 210 (1870).

In Henry Inv. Co. v. Semonian, 40 Colo. 269, 90 P. 682 (1907), CAMPBELL, J., stated: "A count in indebitatus assumpsit, framed substantially as required at common law, is now held to be a sufficient compliance with the Code mandate as to allegations of fact."

Rules of the common-law pleading, as to materiality, certainty, prolixity, and obscurity, are rules of logic not abolished by the North Carolina Code. Crump v. Mims, 64 N. C. 768, 771 (1870).

The Rules of Pleading at Common Law have not been abrogated by the Code of Civil Procedure. The essential principles still remain. Henry Inv. Co. v. Semonian, 40 Colo. 269, 90 P. 682 (1907); HUGHES, PROCEDURE, ITS THEORY AND PRACTICE, 488 (Chicago, 1905).

[19] Robinson v. Raley, 1 Burr, 317, 319, 97 Eng. Rep. 330, 331 (1757).

technicality and confusion; in which it was pictured as the master and not the servant of the courts, or as an end in itself, instead of an instrument for the fair and equitable adjustment of substantive human rights, the system of pleading and procedure as developed at common law, was gradually brought into popular disrepute by the efforts of well-meaning reformers, who emphasized its admitted defects, but failed to point out to the people of England and the United States the matchless precision of the old system as a vehicle for reducing human controversies into distinct issues of fact or of law, which could be satisfactorily adjusted, thus achieving the principal end of all government, to wit, the preservation of law and order. Entirely too much time and effort have been expended in criticizing[20] or eulogizing[21] the common-law system of pleading. It now seems ap-

[20] Thus, the famous historian, REEVES, in referring to the times of Henry VI [1422-1461] and Edward IV [1461-1483], stated: "Such was the humor of the age that captiousness was not discountenanced by the bench. . . . The calamity has been that after other branches of knowledge took a more liberal turn, the minutiae of pleading continued to be respected with a sort of religious deference." 3 HISTORY OF ENGLISH LAW, c. 23, 621 (Finlason ed. Philadelphia, 1880).

In Allen v. Scott, 13 Ill. 80, 84 (1851), CATON, J., said: "It must be admitted that many of these distinctions are more artificial than substantial, and do not contribute very essentially to the promotion of the ends of justice. So long, however, as we look to the rules of the common law to govern us in pleading, we are not at liberty to disregard them."

Wisconsin Cent. R. Co. v. Wieczorek, 151 Ill. 579, 586, 38 N. E. 678, 680 (1894).

"By the wooden manner in which it came to be administered, many of its artificial distinctions and rules became an obstacle to the very purposes which they were intended to serve, and diverted the attention of the court to side issues, so that the suitor was perhaps unable to get through the vestibule of justice to have the merits of his case considered." SHIPMAN, HANDBOOK OF COMMON LAW PLEADING, *Introduction*, 6, n. 11 (2d ed. by Ballantine, St. Paul, 1923).

[21] Among the eulogies by Judges, Lawyers and Writers may be listed the following:

Littleton, during the reign of Edward IV [1461-1483], in referring to the art of common-law pleading, declared: "And know, my son, that it is one of the most honourable, laudable, and profitable things in our law, to have the science of well pleading in actions real and personal; and therefore I counsel thee especially to imploy thy courage and care to learn it." 2 COKE, upon LITTLETON [INSTITUTES OF THE LAWS OF ENGLAND] Lib. 3, Cap. 9, § 534 (1st Amer. from the 16th European ed. Philadelphia, 1812).

PROFESSOR SAMUEL TYLER stated: "It [the common-law system of pleading] must be admitted to be the greatest of all judicial inventions." FIRST REPORT OF THE MARYLAND COMMISSIONERS ON RULES OF PRACTICE IN THE COURTS, 80, 81 (Frederick, 1855).

"This [the common law] system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct

propriate that its function as a workable and expanding instrument of justice for generations, in both England and America, should be pointed up and emphasized as well as its long-term significance as the fountain-source of our modern substantive and remedial rights, if not our very liberties,[22] and finally, its value as an influence which continues and must inevitably continue to mould future Anglo-Saxon conceptions of law and justice in a free society, if we are to preserve our ideal of government by law as opposed to government by men.[23]

What, then, is the place of common-law pleading in the law and what is its real significance to modern procedure?

1. *The Place of Common-Law Pleading in the Law.*—Anglo-American law has been separated into two main divisions—public law—which has to do with the regulation of relations between independent states and between a state and its citizens and—private law—which regulates the relations between the citizens of the state. Public and private law, in turn, are divided into two branches, to wit, substan-

administration of justice in common-law courts." GRIER, J., in McFaul v. Ramsey, 20 How. (U. S.) 523, 525, 15 L. Ed. 1010, 1011 (1857).

According to PROFESSOR KEIGWIN, CASES ON CODE PLEADING, *Introduction,* 16 (Rochester, N. Y., 1926), the Code has been of doubtful value in simplifying procedure: "One who will read the reports of New York or of any other Code State will observe that before the reform few cases turned upon points of pleading, and that most of such cases involved questions of substantive law which were presented in technical guise by reasons of their development upon the record; it will also be observed that the adoption of the Code was at once followed by a large increase of litigation concerning procedural matters, which kind of litigation shows no present signs of abatement. Indeed, the current digests disclose an immensely greater number of cases deciding pure matters of pleading in the Code States than cases of that kind coming from common law jurisdictions. One reason, of course, is that the common law system is so thoroughly settled that few novel questions can arise."

For a statement of similar tenor, see GREEN, *Treatise in Pleading and Practice Under the Code System* (St. Louis, 1879).

"'The love of innovation induced the State of New York some years ago, to abrogate common-law pleading, and introduce a code of procedure for the regulation of litigation in her courts; and notwithstanding the lamentable confusion and uncertainty. and the greatly increased expense which has thereby been brought into the administration of justice in that State, other States have followed in her track of barbaric empiricism. Mr. Justice Grier has, from the bench of the Supreme Court of the United States, rebuked the folly of abolishing common-law pleading, and substituting the common-sense practice, as it may be called, in its stead.'" STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING, *Preface,* vii (3d Amer. from 2d London ed. by Tyler, Washington, D. C., 1895).

22 STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING, *Introduction,* 23 (3d Am. ed. by Tyler, Washington, D. C. 1893). See also, HEMMINGWAY, *History of Common Law Pleading as Evidence of the Growth of Industrial Liberty and Power of the Courts,* 5 Ala. L. J. 1 (1929).

23 Apparently the earliest use in America of the phrase "government by law as opposed to government by man" is found in Part I, art. 30, of the Massachusetts Constitution of 1788.

tive law, which defines rights and liabilities, and adjective or procedural law, which furnishes the ways and means of enforcing these rights and liabilities. In private law, adjective law, in its broadest aspects and prior to 1848, included (1) Common-Law Pleading; (2) Equity Pleading; (3) Evidence, and (4) Trial Practice. The position of common-law pleading in the law will, therefore, appear clearly from the chart on the next page. As a result of the impact of the New York Code of Procedure in 1848,[24] our modern system of Code Pleading,[25] which is a combination of the better elements of the common law and equity systems of pleading, came into existence.

The influence of this development under the codes finally led, in 1938, to the new Federal Rules of Civil Procedure for the regulation of practice in the federal courts. Following the example of the nation some of the states subsequently abandoned their codes in favor of a system of procedural regulation by rule of court. This article, however, is concerned primarily with the fundamental principles of civil procedure and pleading as developed at common law. And civil procedure is "the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right."[26]

2. *The Importance of Common-Law Pleading.*—To the beginning student or prospective lawyer, an understanding of the fundamental principles of common-law pleading and procedure is highly essential. While the greater portion of our modern law school curriculum is devoted to a consideration of substantive law, the student should constantly bear in mind that a litigant's substantive rights ordinarily cannot be effectively sustained except by one adequately trained in the art and science of procedure, who appreciates the tech-

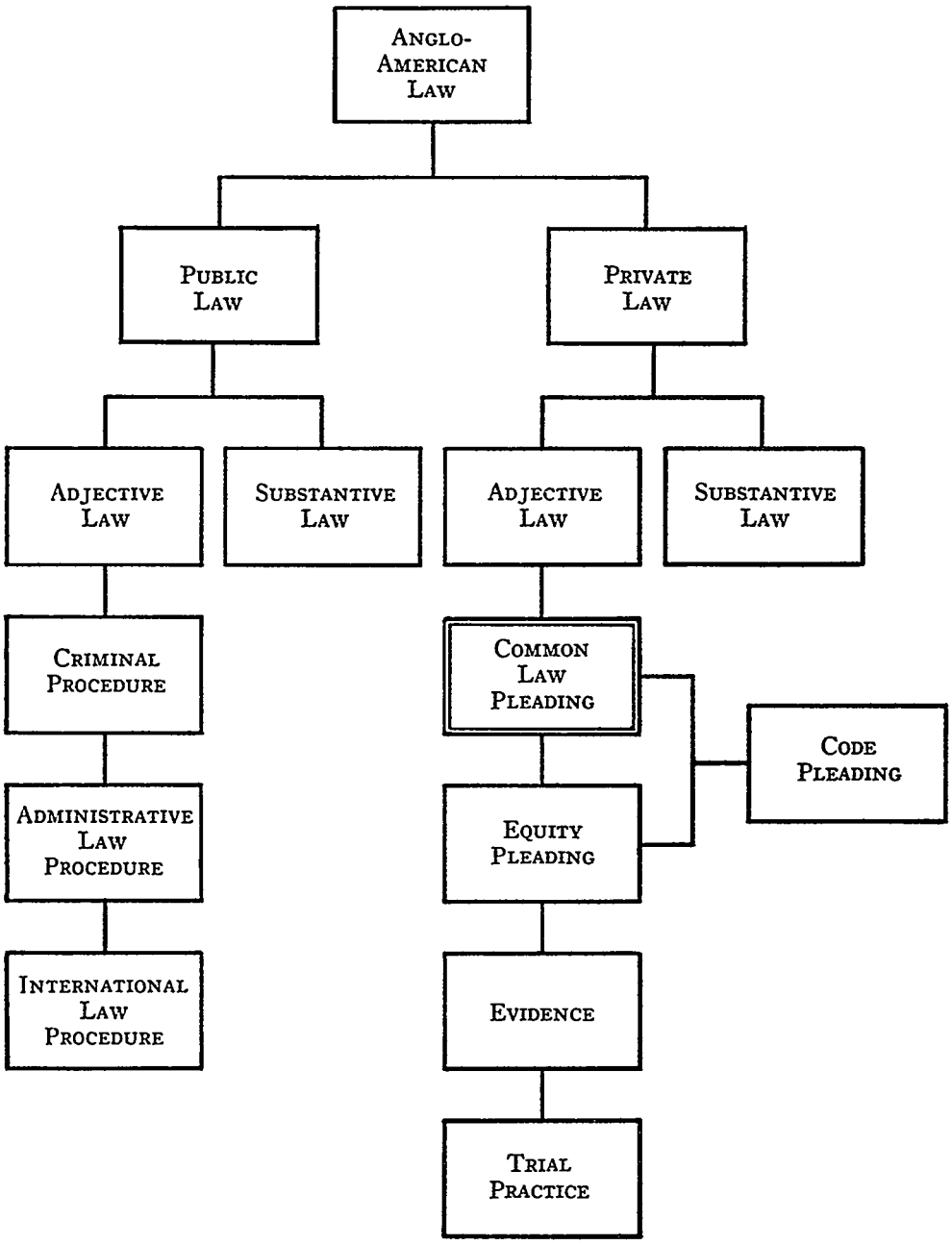
[24] N. Y. Laws 1848, c. 379.

[25] "Code Pleading is the term applied to the reformed system of pleading initiated by the New York Code of 1848 and now in force . . . in American jurisdictions. It is this latter system which concerns this book. But since it developed from the former systems [common law and equity] and in many respects continues various details and parts of them, it is necessary to consider the antecedents in the other systems." CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, c. I, 4 (2d ed., St. Paul, 1947).

[26] Poyser v. Minors, 7 Q. B. Div. 329, 330 (1881), LUSH, L. J.

For definition of procedure, compare, GREENIDGE: "Procedure may be defined as a series of symbolic actions, generally accompanied by words, and, in developed societies, by the exhibition of written documents, by means of which rights or liberties guaranteed by a society are reascribed by its individual members. Reassertion is the essence of procedure; for in the sense in which we use the term—the sense of regaining before a competent court a status that has been lost or questioned—it assumes an already violated right." GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME, *Introduction,* 1 (Oxford, 1901).

CHART SHOWING POSITION OF COMMON-LAW PLEADING IN THE LAW



nical steps and maneuvers necessary to present properly his client's case in court, and how to conduct it to a successful conclusion. A mere mechanic of the law may get in and out of the court, but often to the detriment of the client's interest, and in a manner destructive of the standards of the legal profession. If, however, he desires to become an artisan of the law, to fully appreciate the significance of the reformed procedure and the procedural tools used for the protection of his client's interest, he must understand the fabric of the common law out of which they have been constructed. In order to do this he must be conversant with the evolutionary steps which led up to our modern system of procedure.[27] In short, unless a lawyer is sufficiently expert in handling the procedural devices available under the law, any knowledge which he acquires concerning the substantive law goes for naught. It thus appears that a mastery of adjective law is a prerequisite to a mastery of the law as a whole if a person hopes to become a successful lawyer. For as Justice Story so truly said: "No man ever mastered it, [special pleading] who was not by that means made a profound lawyer."[28] It is necessary, therefore, that every individual who desires to become a serious student of the law should have a full appreciation of the importance of common-law pleading.

In the *first* place the study of common-law pleading is important because through its study the student acquires a working appreciation of the historical development of the law. He comes to realize the relationship between procedural and substantive law, that right

27 "The importance of a study of common-law pleading rests, *first,* on the relationship between the modern substantive and ancient remedial law in the scheme of forms of action; *second,* the relationship between modern remedial and ancient remedial law; and, *third,* the fact that the older cases are expressed in terms of pleading, so that they cannot be studied understandingly without it. The statutes which seek to abrogate or simplify common-law pleading use its terms. In order to understand the progress of the law, the well-educated lawyer must live through its evolution. Further, in modern codes the foundation ideas of pleading have not changed." SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING, 5 (3d ed. by Ballantine, St. Paul, 1923).

See, also, VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION, c. I, *Introduction*: 1. *The Importance of Procedure in the Work of the Practicing Lawyer and in the Study of Law* (New York, 1952).

28 This statement by JUSTICE STORY was made in "An Address Delivered Before the Members of the Suffolk Bar, at their anniversary, on the Fourth of September, 1821, at Boston," and is reported in 1 Am. Jur. 1, 28 (1821).

Special pleading, in popular language, refers to the adroit and plausible advocacy of a client's case in court. But, from the viewpoint of the common law it refers to pleading by specific allegations as opposed to general allegations. [HEPBURN, THE DEVELOPMENT OF CODE PLEADING, c. III, 65, 66 (Cincinnati, 1897); CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, c. I, 13, n. 24 (2d ed. St. Paul, 1927)].

and remedy are bound together,[29] that substantive rights are expressed in terms of remedial rights and forms of action. In short, it is essential to realize that the forms of action are, in fact, the categories of legal liability, and that most of our modern substantive contract, tort and property law, had its origin in and developed out of procedure. It was in this very connection that Sir Henry Maine observed that the rules of substantive law had the appearance of being "secreted in the interstices of procedure."[30] What Maine was saying was that the study of the forms of action is one of the richest sources of information for a student of legal development and theory, that there can be no true understanding of the law except as against its historical background and that this history can only be fully and intelligently interpreted in the light of the origin and growth of procedure.[31]

In the *second* place a knowledge of common-law procedure is essential as an aid in understanding the early English and American decisions in which rulings on the law are only comprehensible to the modern student in the light of a working knowledge of pleading at common law. The issues in these early cases, framed at a period of time when it was not yet certain whether the pleadings should be English, French, or Latin, and while the pleadings were still in their developmental stage,[32] were necessarily formulated on the basis of the older system. In consequence, the opinions rendered in these cases are sometimes in language and phraseology understandable only by one versed in the common-law system of procedure. Thus, the phrase "the lessor of the plaintiff" is understandable only in the light of the fiction in ejectment; the doctrine of *quid pro quo* has meaning only to one who has studied the early cases involving debt; and an "exe-

[29] MAITLAND clearly had this in mind when, in referring to the dependence of right upon remedy, as illustrated by the Common Law Forms of Action, he declared: "The forms of action we have buried, but they still rule us from their graves." THE FORMS OF ACTION AT COMMON LAW, c. I, 2 (Cambridge, 1948).

[30] MAINE, EARLY LAW AND CUSTOMS, c. XI, 389 (New York, 1886).

But compare the statement of Street, who declared: "To the modern mind no line of cleavage is more marked than between substantive and adjective law. It was not always so. The very term 'adjective law' was first used by Bentham. In early stages of legal growth the two elements are inseparable." 3 FOUNDATIONS OF LEGAL LIABILITY, c. I, 1 (Northport, 1906).

[31] SIR MONTAGUE CRACKENTHORPE, O.C., in an address to the American Bar Association, in reference to the utility of the study of common-law pleading, stated: "And, so long as written pleadings remain, the best masters of the art will be they who can inform the apparent license of the new system with that spirit of exactness and self-restraint which flows from a knowledge of the old." Note, *Common Law Pleading*, 10 Harv. L. Rev. 238, 239 (1896).

[32] For the story of the language of the pleading, see HOLDSWORTH, HISTORY OF ENGLISH LAW (Boston, 1931).

cuted consideration" is meaningful only against the historical development of assumpsit out of the tort action of trespass on the case *super se* assumpsit. Moreover, one called upon to consider a decision in the Year Books[33] might be struck by the inclusion of much material or discussion which had no apparent bearing upon the final result.[34] But such inclusion would be clear to one acquainted with the history of pleading, particularly that stage of it in which the pleadings were settled in the heat of battle, in the presence of one's adversary, and by a process of oral altercation in which the litigants, the enrolling clerks, the lawyers and the judges played leading roles.[35]

In the *third* place, a knowledge of procedural law is an essential ingredient of the process by which the beginning law student acquires the technique of analyzing causes of action.[36] *First,* it has value as an exercise in legal logic, and it serves "to fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding."[37] These qualities constitute the foundation of all legal investigation. *Second,* the shadings between the common-law forms of action afford the student excellent practice in distinguishing one decision from another. *Third,* no educational device is comparable to a course on common-law pleading for the purpose of teaching the beginner how to brief a case, reduce the controversy to a single, clear-cut, well-defined issue of fact or of law, determine the holding of the court and formulate the rule and principle of the decision. In short, it is an excellent device for extracting, like the roots of an equation, the true points in dispute; it is a time-tested scheme of matchless precision for separating the issues of fact from the issues of law, for the purpose of referring the case to the court or the jury. Finally, it gives the student a valuable insight into the problem of what constitutes a cause of action, which is a necessary technique under any system of procedure.

In the *fourth* place, a knowledge of common-law pleading is essential to a full and comprehensive understanding of modern plead-

[33] WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY, c. I, 11-12 (Cambridge, 1925).

[34] WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY, c. VII, 153-154 (Cambridge, 1925).

[35] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, c. 6, 68 (14th ed. by Lewis Sturge, London, 1952).

[36] For Cooley's full statement see, RELATION OF COMMON LAW PLEADING TO CODE PLEADING, c. I, § 8 (III), *infra* at 45.

[37] SIR WILLIAM JONES, PREFATORY DISCOURSES TO THE SPEECHES OF ISAEUS, c. IV, 34 (London, 1784). See, also, WARREN, LAW STUDIES, 1058 (3d ed. London, 1863).

ing and practice. In making a study of pleading at common law the student is not dealing with rules which are obsolete and without intimate relation to the existing law. The fundamental principles of common-law procedure still prevail; only its technical and archaic characteristics have been abolished by modern codes, practice acts and rules of court. This is true because code pleading springs from a common-law ancestry; because codification at best is only partial in scope, hence the principles of common-law pleading necessarily remain as the great residuary law from which the gaps in the code system of procedure have been and will continue to be filled,[38] and against the background of which its every provision must be construed and understood. Thus, to give but one example, the code states that "the complaint must be stated in plain and concise language," which calls for explanation or interpretation. Does it actually mean what it says or does it mean something else? After full consideration the courts have found that at common law the declaration, in order to state a good cause of action, was required to state ultimate facts, and not evidentiary facts and not conclusions of law, and that the rule under the statutory provision in question is the same as at common law.[39] The provision, therefore, has no meaning except as construed against its common-law background.

With a statement of the reasons why a knowledge of common-law pleading is important, in mind, it may next be helpful to consider the functions of pleading.

3. *The Functions of Pleading at Common Law.*[40]—The principal reason why many ordinary controversies are utterly fruitless and inconclusive is that prior to the discussion there is no ascertainment by the contending parties of the issues at stake. If every discussion were preceded by a clear-cut settlement of the questions in dispute, it would not prove difficult to settle the actual differences between the disputants, and in many instances it would develop that there was in reality no difference of opinion.[41] Pleading, which is a

38 "All those preexisting rules [of pleading, at common law or in equity], which are not expressly abrogated, and which can be made applicable under the new system [the Code] remain in force." SPENCER, J., in Rochester City Bank & Lester v. Suydam, 5 How. Pr. (N. Y.) 216, 219 (1851).

39 Allen & Carpenter v. Patterson, 7 N. Y. 476 (1852).

40 "The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision." ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, c. 6, 67 (14th ed., by Lewis Sturge, London, 1952).

41 SHIPMAN, HANDBOOK OF COMMON LAW PLEADING, *Editor's Introduction*, 8 (3d ed. by Ballantine, St. Paul, 1923).

statement in a logical, legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense,[42] is designed to prevent the presentation of such fruitless and immaterial controversies in courts of law. The functions of pleading, therefore, have been developed with this end in mind.

The *first* or primary function of pleading is to reduce the controversy between the parties to a single, clear-cut, well-defined issue[43] of fact or of law, or, stated in another way, to separate issues of law from issues of fact[44] so that the issues of law might be decided as far as possible prior to the trial of the facts. This was made necessary by the dual character of the common-law tribunal, that is, of the court, which generally decides questions of law, and the jury, which generally determines issues of fact. By this process the matters on which the parties differ and the points on which they agree, are ascertained with precision, and thus the issues over which the parties are contending are presented for judicial determination. The pleadings are not, as frequently assumed in popular estimation, an advocate's address to the judge or jury. On the contrary they are the formal statements, drawn up by the counsel of the respective parties, of the plaintiff's cause of action or the defendant's defenses. From the clash of assertions are disclosed the points in controversy, the propositions affirmed on one side and denied on the other, on which the decision of the case will turn. Thus, the primary function of pleading, that is, of defining the issues over which the parties are contending, is achieved. "The points admitted by either side are thus extracted and distinguished from those in controversy; other matters though dis-

[42] Bocock v. Leet, 210 Ill. App. 402 (1917). For other definitions of the term "pleading," see Crumleve v. Cronan, 176 Ky. 818, 197 S. W. 498, 503 (1917), in which HURT, J., stated: "Pleadings are statements which set out causes of action and grounds of defence, and make issues in the action which is to be tried;" and Smith v. Jacksonville Oil Mill Co., 21 Ga. App. 679, at 679, 94 S. E. 900, at 900 (1918), in which LUKE, J., declared: "Pleadings are the written allegations of what is affirmed on the one side or denied on the other, disclosing to the court or jury trying the matter in dispute between the parties."

See, also, the early English case of Read v. Brookman, 3 T. R. 159, 100 Eng. Rep. 509 (1789).

[43] "The term, itself, of 'issue' appears as early as the commencement of the Year Books, that is, in the first year of Edward II (Year Book, 1 Edw. II, 14), and from the same period, at least, if not an earlier one, the production of the issue has been not only the constant effort, but the professed aim and object of pleading." STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, c. II, 151 (3d Am. ed. by Tyler, Washington, D. C. 1893); SHIPMAN, HANDBOOK ON COMMON LAW PLEADING, *Editor's Introduction*, 8, n. 17 (3d ed. by Ballantine, St. Paul, 1923).

[44] SHIPMAN, HANDBOOK OF COMMON LAW PLEADING, *Editor's Introduction*, 8 (3d ed. by Ballantine, St. Paul, 1923).

puted, may prove to be immaterial; and thus the litigation is narrowed down to two or three matters which are the real questions in dispute,"[45] on which the case may be judicially tried in the most expeditious manner.

It is a great benefit to the parties to know exactly what are the facts remaining in dispute, and what facts the plaintiff must prove to sustain his cause of action or the defendant to establish his defense. The question involved may be reduced to an issue of law, in which case it may be decided by the judge upon argument, or it may involve a question of fact, in which case, it may involve a lengthy trial by jury. By separation of questions of law from questions of fact, the parties may be saved great trouble and expense in procuring evidence of facts which their opponent does not dispute, and the state may escape the burden and cost of supervising the litigation of immaterial issues.

The *second* objective of pleading is to reduce questions of fact to clear-cut issues, by eliminating immaterial and incidental matters, and narrowing the case to one or more definite propositions on which the controversy really turns, thus serving as a guide to the court in rulings upon offers of evidence. As the pleadings define and limit the proof, so also do they have a bearing upon the admission or rejection of evidence. Thus, if *A* brings trespass for assault and battery, *B* pleads self-defense, and *A* denies the striking in self-defense, the issue presented is: Did *B* strike in self-defense? Now, if *B* offers evidence that he did not strike *A*, the court is in a position to rule out the offer of proof, as such offer has no logical tendency to support the defendant's plea that he struck in self-defense.

The *third* objective of pleading is to notify the parties themselves and the tribunal which is to decide between them of the respective claims, defenses and cross-demands of the adversaries. Some advocates of reform, irritated by the mischiefs incident to the abuse of technical rules of pleading, have suggested that the parties to an action should come into court without any notice as to the complaint or answer. It is evident, however, that such a system would lead to fraud, oppression and expense in a civilized state where commercial transactions are both numerous and complicated. If, then, notice is

[45] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE, c. 6, 65 (14th ed., London, 1952).

essential, does a mere, general notice[46] of the plaintiff's cause of action and the defendant's ground of defense, serve every purpose? Thus, suppose the plaintiff's declaration reads as follows:

"The plaintiff alleges that the defendant did not pay a bill of exchange for $50.00," to which the defendant interposes the following plea:

"The defendant states that he is not liable on the bill."

From the plaintiff's statement it could not be determined on the pleadings whether he had a sufficient cause of action or not, and from the defendant's plea, it could not be determined whether the defendant denied the acceptance of the bill, or the other legal requisites essential to liability; or, assuming their existence, whether the defendant intended to set up new matter such as fraud by way of answer; nor whether the issue was one of law or of fact. In such a situation every case would have to be considered by a jury in order to ascertain that there was no fact in dispute. It thus appears that the evils of giving no notice would exist nevertheless, expense would be incurred as the parties would have to come to trial prepared to offer proof on anything relating to the case, although only one matter was in reality in dispute. It seems evident, therefore, that "the defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff, in his turn, is entitled to know what defense will be raised to his claim."[47] In support of this view is the statement of Thomas J., in the Illinois case of *Cook* v. *Scott*,[48] who declared: "The province of the declaration is to exhibit upon the record the ground

[46] Issue pleading, as opposed to notice pleading, prevailed at common law, as the chief objective of pleading was to reduce the controversy to an issue of fact or of law. Fact pleading came in with code pleading, which emphasizes the need for an accurate statement of the facts, while in recent years there has developed what is known as notice pleading, or merely giving notice to an opponent of the claim which is being asserted. On issue and fact pleading, see CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, c. I, §§ 11, 56-57 (2d ed. St. Paul, 1947); MILLAR, *Notabilia of American Procedure* 1887-1937, 50 Harv. L. Rev. 1017, 1034 (1942). For a detailed discussion of notice pleading, see article by WHITTIER, *Notice Pleading*, 31 Harv. L. Rev. 501 (1918). And for a suggestion as to how to resolve the conflict between the various views, see article by SIMPSON, *A Possible Solution of the Pleading Problem*, 53 Harv. L. Rev. 169, 187-189 (1939).

See, also, on notice pleading, the First Report of her Majesty's Commissioners for Inquiring into the Process, Practice and Systems of Pleading in the Superior Court of Common Law (1851), 11-14, reported in REPPY, INTRODUCTION TO CIVIL PROCEDURE, c. I, § 3, 33 (Buffalo, 1954).

[47] ODGERS, PRINCIPLES OF PLEADING AND PRACTICE, c. 6, 65 (14th ed. by Lewis Sturge, London, 1952).

[48] 1 Gilman (Ill.) 333 (1844). See, also, Ohio & M. Ry. Co. v. People, 149 Ill. 663, 36 N. E. 989 (1894).

of the plaintiff's cause of action, as well as for the purpose of notifying the defendant of the precise character of those grounds as of regulating his own proofs."

The *fourth* function of pleadings is to serve as an index to the respective counsel as to the points to be proved at the trial in support of the contentions of their respective clients and in apportioning the burden of proof and rebuttal as between the plaintiff and the defendant.[49] Thus, if *A* alleges that *B* stole his horse, and *B* denies the allegation, *A* knows that he may support his general allegation by proof that *B* took any horse, whereas if *A* had named a black horse, with a white, forefront foot, he would have been limited to proof of that particular horse, while *B*'s defense would be simplified by being limited to defense against taking one specific horse, whereas before he was under necessity of being prepared to defend a charge of taking *any* horse. And it follows logically that the burden of proof would fall on *A* as he has affirmed that *B* took his horse.

The *fifth* purpose of pleading is to serve as a formal basis for the judgment. Beginning with the original writ, let us suppose there is a charge therein that *B* is indebted to *A* in the sum of five hundred dollars. The declaration must contain the same charge in elaborated and consistent form, the proof at the trial must correspond to the charge in the original writ and declaration, the verdict must be found in accord with the same charge, and finally the judgment on the verdict must be made subject to the same limitations, in order to be free from attack as going beyond the scope of the pleadings. By this requirement of correspondence between the various pleadings at each

[49] BALLANTINE, *The Need of Pleading Reform in Illinois,* 1 U. of Ill. L. Bul. No. 1, 14-16 (1917).

The Massachusetts commissioners of 1851 state the purposes of civil pleading as follows: "(1) that each party may be under the most effectual influences, which the nature of the case admits of, so far as he admits or denies anything, to tell the truth, (2) That each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary. (3) That the court may know what the subject matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limitations and discern what rules of law are applicable. (4) That it may ever after appear what subject matter was then adjudicated, so that no further or other dispute should be permitted to arise concerning it." 6 Mass. L. Q. 104 (1921); HALL'S MASSACHUSETTS PRACTICE (Boston, 1851).

As to functions of criminal pleading and the certainty and precision required, see United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 (1875); MILLAR, *The Reform of Criminal Pleading in Illinois,* 8 J. Am. Inst. Crim. L. & Criminology, 337-361 (1917); MILLAR, *The Modernization of Criminal Procedure,* 11 J. Am. Inst. Crim. L. & Criminology, 344-367 (1920).

stage of the proceedings the common law secured in pleadings what we refer to in English composition as unity, coherence and emphasis.

The *sixth* and final function of pleading is to preserve a record of the controversy litigated, which serves as a foundation for a plea of *res judicata,* which, if sustained, operates to prevent the relitigation of the same controversy, provided it involves the same parties and the same subject matter. Thus, in the early New York case of *Farrington* v. *Payne,*[50] where *A* sued *B* for the conversion of three bed quilts,—a bed and three bed quilts having been taken away—and recovered, after which he brought a second action for conversion of the bed, to which *B* pleaded former recovery for the same act and subject matter, it was held by the court that the judgment in the first suit was a bar to the plaintiff's second action. And this same rule applies under the reformed procedure in the same manner as at common law.[51]

The claim of the law of pleading to be a science must, therefore, be measured by the extent of its adaptation of its rules to the accomplishment of its main functions, that is, fair notice to the parties and

[50] 15 Johns. 432 (N. Y. 1818).

[51] In Secor v. Sturgis, 16 N. Y. 548, 554 (1858), decided under the Code, STRONG, J., says: "The principle is settled beyond dispute that a judgment concludes the right of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (Farrington v. Payne, 15 Johns. 432; . . . Philips v. Berick, 16 id. 137; . . . Guernsey v. Carver, 8 id. 492; Stevens v. Lockwood, 13 id. 644 . . .). But it is entire claims only, which cannot be divided within this rule, those which are single and individual in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions."

In general, on the splitting of causes of action see

Articles: CLINEBURG, SPLITTING CAUSE OF ACTION, 19 Neb. L. Bull. 156 (1940); MCNISH, JOINDER AND SPLITTING OF CAUSES OF ACTION IN NEBRASKA, 26 Neb. L. Rev. 42 (1946); COLVIN, INJURIES TO PERSONS AND PROPERTY—ONE ACTION OR TWO, 2 Ala. L. Rev. 75 (1949).

Note: Pleading—Splitting Causes of Action—Counterclaim in Court of Limited Jurisdiction, 36 Yale L. J. 883 (1927).

the accurate, practical and systematic presentation of the precise questions of law and fact involved to the tribunal which is to decide them. The various and possible functions of pleading may therefore be enumerated as follows:

(1) To reduce the controversy between the parties to a single-clear-cut well-defined issue of fact or of law, or to separate issues of law from issues of fact, so that the issues of law may be determined as far as possible in advance of the trial of the facts;

(2) To reduce questions of fact to clear-cut issues by eliminating immaterial and incidental matters, and narrowing the case to one of more specific propositions on which the controversy really turns, thus operating as an aid to the court in admitting or rejecting offers of evidence;

(3) To notify the parties themselves and the deciding tribunal of the respective claims, defenses and counter-demands of the adversaries;

(4) To serve as an index to the respective counsel as to the points to be proved at the trial and as a guide to the court in apportioning the burden of proof and rebuttal as between the plaintiff and defendant;

(5) To serve as a formal basis for the judgment;

(6) To preserve a record of the controversy litigated and to create a foundation for a plea of res judicata, thus preventing a relitigation of the same controversy between the same parties at a later date.

It thus becomes clear that historically, the principal purpose of the rules of pleading has been to compel each person to state the essential elements of his claim or defense in order to arrive at an issue. It has not always been true that common-law pleading has accomplished the objective of reducing all cases to definite issues, this end being defeated on occasion by resort to technical procedural devices which had outgrown their days of usefulness.[52] But in both common-law and code pleading, the issue-raising function far overshadows the notice-giving one, and is the source of the principal rules of pleading. It is so under the modern English pleading. The case must be analyzed and reduced to issues at the trial, if not before, and

[52] WHITTIER, *Judge Gilbert and Illinois Pleading Reform*, 4 Ill. L. Rev. 174, 176-178 (1910).

it is inexpedient to postpone this essential preliminary to the day of trial.

4. *The Development of Substantive Law Out of Procedure.*— Under Anglo-American law, the substantive law defines rights and liabilities and the procedural law furnishes the ways and means of enforcing those rights and liabilities. But in what order did this development take place? Were rights and liabilities first defined and thereafter courts established to enforce those rights and liabilities, or were courts first set up and thereafter rights and liabilities defined? This question, if asked of a beginning student of the law, will invariably be answered by a statement that rights and liabilities would first be defined, with the courts to enforce them to be established thereafter.[53]

In fact the law grew up in exactly the opposite way, courts being organized to handle a series of specific cases, the decision of which gradually developed theories of rights and liabilities. In short, our rights and liabilities as defined by substantive law, had their origin in and developed out of procedural law. If this be true, how did it come about? Let us assume that *A* and *B* are shipwrecked and land on the proverbial uninhabited, deserted island. *A*, quickly recovering from the shock, shakes the water off, works his way up to a nearby knoll, where the ground is level and the view good, and says: "I like this place; I think I shall take possession." Who owns that knoll? *A* owns it by reason of having first acquired possession, by reason of his strong right arm. As a result he may also be said to have acquired a moral but not a legal right to retain possession. Some time later, *B* pulls himself together, and discovers *A* on the knoll. Arriving there, he surveys the prospect with satisfaction equal to that of *A*, and then after pondering over the situation, declares: "I like this knoll too; I think I shall take it." "Oh, no you won't," exclaims *A*; "This knoll belongs to me." "Oh, yes I will," retorts *B*. "Oh, no you won't" bristles *A*, whereupon *B*, abandoning further argument strikes *A* over the head with a club, and takes possession. Now, who owns the knoll? *B*. By what right? Not by a moral right, as *A* preceded him in possession in point of time; not by a legal right, because in the absence of a court in which a remedy could be sought,

[53] "A system of laws promulgated by a law given of sufficient wisdom and illimitable foresight would ultimately commence with a definition of rights and thence proceed to prescribe duties, thence to prohibit wrongs, and finally to provide legal remedies." ROBINSON, ELEMENTS OF AMERICAN JURISPRUDENCE, c. 5, § 5, 155 (Boston, 1900).

no such right yet existed. In reality *B* now owns the knoll by right of the strong arm; by right of might, that being at the moment the only law in effect on the island.

Without going into the evolutionary developments involved, let us say that time moves on, and later we find that other members have joined the society of *A* and *B*—men, women, and children. After this development, *C* hits *D* over the head with a club; the blow glances off *D's* head and strikes *E*, the child of a third party. Immediately there is great excitement in the community. The people crowd together, and someone is heard to say: "As long as *A* and *B* were the only inhabitants on this island, this business of their hitting one another over the head was their own affair; but now that there are others here, we must do something to control such actions." But "What can we do" exclaimed the others! At this point someone suggested that the group should select a leader, hail the individuals before that leader, who would then hear both sides of the controversy and render a decision. Accordingly, the group chose its fastest runner, its wisest counselor, its best medicine man, its most esteemed religious adviser, or its greatest military leader, escorted him to the edge of the forest, and set him up on a stump to decide the controversy. Thus, was the court or tribunal created; thus, did the group take its first step in the development of the law; thus, did it prepare the way for transforming moral into legal rights. Then the group took *C*, *D* and *E* before the newly created tribunal. In turn *D* and *E* were required to tell their story, and *C* was permitted to present his side. Before any decision was rendered the most that could be said in favor of *D* and *E* was that in the view of the group, their moral right not to be interfered with had been violated; as yet they had no legal rights as they were still without a remedy. After hearing both sides of the controversy, let us assume that the court, presided over by the chosen leader, who has now become a judge, fines *C* twenty hides, ten hides to go to the injured parties, ten hides to go to the community. At the moment of decision, *D* and *E* for the first time had acquired a legal right not to be struck, the moral right having been changed into a legal right through the acquisition of a legal remedy. Let us now assume further that after two or three similar episodes of this kind, in which the *B's* and *C's* were fined for having struck someone, the wiser members of the group, while wending their way home from the court, began to reason somewhat as follows: If, when *B* strikes *A*

over the head with a club, he is hailed before a court and punished, it must be because *A* had a right not to be struck; if *A* has such a right, then *B* must be under a duty not to violate it; if *B* does violate *A's* right not to be struck and his own duty not to strike, *B* commits a wrong for which he may be held liable. Thus, the concepts of right and duty,[54] of wrong and liability, are merely different sides of the same shield. If the rights violated involved a breach of duty to the community or state, the accused was said to be guilty of a criminal wrong, whereas if the rights violated were concerned with similar breaches of duties as between individuals of the group or society, the accused were said to be guilty of a civil wrong. But at this stage of the discussion, the important point to be observed in the foregoing account is that these primitive legal concepts of right, duty, wrong and liability, had their origin in and developed out of procedure, that is, out of the process by which a myriad of single instances, of specific factual situations, were presented to and decided by a court; that the substantive law right of *A*, *D* and *E* not to be struck, came into existence only upon the pronouncement of judgment by the tribunal.

This process not only produced a body of substantive contract, property and tort law but it also exercised, as we shall see, a profound effect upon the form of our judicial organization, which in turn developed the five great systems of administrative, admiralty, common, equity and probate law.

But as our modern codes of civil procedure have been patterned in some respects after the modes of procedure in equity, which in turn, were influenced by the civil law of Rome, it might be useful to trace in broad outline some of the principal features of Roman civil procedure, in order to furnish the student with an apperceptive background against which the adjective common law may be compared.

5. *The Roman System of Civil Procedure.*[55]—The civil law of

[54] See LANGDELL, *A Brief Survey of Equity Jurisdiction*, 1 Harv. L. Rev. 1 (1887).

[55] In general, on the Roman System of civil procedure, see:

Treatises: GAIUS, INSTITUTES OF, AND RULES OF ULPIAN (New York, 1880); ENGELMAN, DER ROMISCHE CIVILPROGRESS (Brelau, 1891); GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME, *Introduction*, 1 (Oxford, 1901); SOHM, THE INSTITUTES, c. 224-301 (Tr. by Ledlie, 3d ed. Oxford, 1907); BUCKLAND, A TEXT-BOOK ON ROMAN LAW, c. XIII, *The Law of Procedure. Legis Actio Formulo Cognito*, 599-667 (Cambridge, 1921); BUCKLAND AND MCNAIR, ROMAN LAW AND COMMON LAW, c. XII, *Procedure*, 398-423 (2d ed. by Lawson, Cambridge, 1952).

Articles: SCRUTTON, ROMAN LAW INFLUENCE IN CHANCERY, CHURCH COURTS, ADMIRALTY AND LAW MERCHANT, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, Bk.

ancient Roman and the common law of England constitute the two great rival world systems of law. For purposes of comparison the student should have some knowledge of their differences and similarities. Roman law, expanding with the empire, was one of the principal devices by which Roman imperial authority was maintained. It is no surprise, therefore, to learn that the legal history of Rome, like its political history, was separated into three periods:[56]

The Period of the Kings.—In this period, also known as the period of the *legis actio* procedure, which was characterized by great formality, according to Professor Samuel Tyler, the administration of justice was largely a matter of royal discretion, cases being decided on a basis of abstract justice. The procedure, like that of most primitive societies, was characterized by the development of forms of action—five in number.[57] If a plaintiff wished to secure relief for an alleged wrong, he was required to bring his claim within the scope of one of the established forms of action. The issue in each case was formulated in advance of the trial, being framed before the *praetor,* who extracted it from the plaintiff's and defendant's statements, and conducted the proceedings to a point where they were in shape for a final decision, whereupon the *praetor* referred them to a *judex,* a private person selected for a specific case by the parties themselves,[58] whose function it was to investigate the facts and pronounce judgment upon the issue. It thus appears that the Roman system of procedure at this stage was analogous to the common law system at relatively the same stage of development, that is, both systems developed forms of action which came to be the test of substantive rights, and both systems framed the issue in advance of trial, the issue under the Roman system being framed by the *praetor* and then referred to the *judex* for trial, while the issue under the common law system was framed by the pleadings, and then referred to the jury for trial. At

I, Pt. II, 7, 208 (Boston, 1907); KOCOUREK, *The Formulary Procedure of Roman Law,* 8 Va. L. Rev. 337-355, 434-444 (1922); DORSEY, *Manifestations of Roman Procedure,* 9 Am. L. School Rev. 1482 (1943).

[56] See STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, *Introduction,* 2 (3d Am. ed. by Tyler, Washington, D. C. 1893).

[57] Gaius tells us "that the *legis actiones* were five in number, each taking its name from its special characteristic feature, viz., (1) the *legis actio per sacramentum,* (2) that *per judicis postulationem,* (3) that *per condictionem,* (4) that *per manus injectionem,* and (5) that *per pignoris capionem.*" MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, c. IV, § 33, 182 (Edinburgh, 1886).

[58] STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING, *Introduction,* 2 (3d Am. ed. by Tyler, Washington, D. C. 1893).

this point, however, the analogy ceases, as at common law the issue resulted from alternate pleadings or by acts of the parties, whereas, under the civil law, the issue was extracted and formulated by the *praetor* or other magistrate from the statements, as opposed to the pleadings of the parties—a fundamental distinction, the significance of which will appear later.

The Period of the Republic.—Into the early part of this second period, which was also known as the period of formulary procedure, the *legis actio* procedure of the first period, was extended. But, observes Professor Tyler, gradually the administration of justice passed from royal hands into the control of the consuls, *praetors* and inferior magistrates. As we saw in the first period, so in this period, the judicial reference of the issue is framed by the *praetor* and as directed to the *judex* was known as an edict. This edict contained, according to a certain formula, a statement of the facts in dispute, the general rules applicable thereto, with instructions to the *judex* to see that his decision and the facts as he found them were in conformity. In time these oral formulae of the *legis actio* procedure became inadequate to meet the needs of an expanding empire. In other words, under the *praetor* and his jurisdiction, using the old forms of action of the twelve tables, which procedure extended into the early part of the period of the republic, every suitor was required to bring his suit within the limitations of a specific form of action; failing to do so, he was without remedy, however just his complaint. But as the nation grew the old forms of action were in practical effect abolished, and legal remedies, freed from their restrictive influence, were enlarged. In consequence, the *praetor urbanus* acquired authority to make new rules and frame new orders to fit special cases. So, when a complaint was made which was not covered by the old forms of action, the *praetor* could, upon a statement of facts, allow the complainant an action, place the facts and issue in a new formula, and then turn the matter over to the *judex*. By this process new remedies enforcing claims not before cognizable under the law grew up, with the resultant establishment of new rules of substantive law to meet the expanding needs of a rapidly growing empire; and by analogy, in very much the same manner in which the action of Trespass on the Case, as the great residuary remedy of the common law, was used to expand remedial relief in all cases similar to but not quite identical with trespass. And as the new remedies were required to observe

the form of the old, progress and the Roman conception of conservatism were brought into conformity, marching forward hand in hand, and converting customs and new commercial practices into substantive law.

As each *praetor* took office he published an edict setting forth the principles upon which he intended to administer justice. By such declaration, known as a continuous edict, the praetor gave the appearance to the litigants of acting under a set of pre-established general rules, influenced by the special interests of a specific case. Where a case did not fall within the scope of a continuous edict, special edicts were framed by the *praetor*. In practice these continuous edicts prevailed for but one year, but as succeeding praetors adopted the rules declared by their predecessors, there gradually developed a body of edictal law, which, when once established, had the same authoritative effect as if it had been enacted by a legislature. When new usages and customs grew up they found expression in the edicts, which in effect constituted the purest sort of legislation.

And the edictal direction was not the only mode of action available to the *praetor;* he might order specific relief, such as restitution of a specific thing, or he might by interdict enjoin certain things from being done, either in a preliminary or final proceeding.

Because of Rome's relation to foreign states, Roman law also underwent development in a different direction. In the case of states with whom she had treaties, it became necessary to give their citizens, who were aliens under the Roman law, certain civil rights such as the right to hold property within the Roman empire. For this purpose, by 247 B.C., a magistrate known as *praetor peregrinus,* was annually elected, and given the necessary jurisdiction. In these cases both parties were not Roman citizens, and the transactions entered into were not made with reference to Roman law, hence the *praetor* had to apply principles common to all systems of law, thus giving the Roman magistrates a practical acquaintance with the laws of foreign states, which in time, came to be recognized as a law of nations; which in time, became part of the civil law of Rome. In consequence the rights and obligations of foreigners, as well as those of Roman citizens, were judicially enforced. And from the law of nations, if we may believe the Roman jurists, came the law of contracts, sales, loans, bailments, partnership, and the law of slavery insofar as it established the right of property in man.

The development of both procedural and substantive law by judicial decision resulted in great confusion, as the body of the law became unwieldy. Moreover, as one *praetor* was not bound by the decisions of his predecessors, there was little in the nature of fixed principles of law. In this situation a class of men known as Roman jurists arose during the time of Cicero, Quintus Mucius Scaevola being the first, and Servius Sulpicius being the second. They were not mere practicing lawyers, whose function it was to give legal advice and draft documents in legal form, but who were not permitted to conduct cases before a court. This was the function of the jurists in both civil and criminal cases, as well as to appear in the senate and before great assemblies. The jurists occasionally appeared in public at certain places, for the purpose of giving oral advice to those who sought it. They also opened their homes for the same purpose. Young men, seeking a knowledge of law, were permitted to be present to hear the advice given and to observe the mode in which the business was transacted. Thus, for example, Cicero became a student of Scaevola.

During this period Roman law underwent great expansion on both the procedural and substantive law sides. On the procedural side the chief point of interest to be observed is that under the formulary procedure which succeeded the *legis actio* procedure, the earlier practice of the *praetor* in extracting the issue from the statement of the parties was gradually abandoned in favor of the less restricted formulary system, which was adaptable to new and widely varied claims, drawn up by the *praetor* or magistrate and accepted by the parties, which latter practice by statute gradually became the accepted mode of framing issues, in much the same way the parties framed issues at common law. Kocourek, a distinguished authority on jurisprudence, criticizes this practice, stating that: "A disputed matter of fact or law or of both, cannot be resolved into simple, ultimate questions of the merits of a controversy by any system of procedure which leaves the formulation of these issues to the adversaries themselves."[59]

The Period Under the Emperors.—According to Professor Tyler it was during this period, which was known as the Libellary Period of Procedure, after the glory of the Republic had vanished, that the jur-

[59] See *Article:* KOCOUREK, *The Formulary Procedure of Roman Law,* 8 Va. L. Rev. 337, 338 (1922).

ists became the great architects of the Roman system of law. The power of the *praetor* was limited and Augustus Caesar, representing the imperial favor, took over the functions of developing the law, giving to certain jurists the privilege of giving opinions in cases referred to them by the *judex;* if the jurists agreed unanimously, the *judex* was bound to follow their opinion; if not, he was free to adopt the opinions which seemed applicable to him. Under this arrangement both the *praetor* and *judex* acted merely as ministerial officers, and in time the two earlier stages of procedure before these officials were abandoned in favor of a trial before a magistrate, without the formality of developing an issue, but with a brief statement of the ground of suit. During the reign of Tiberius Caesar, the opinions of certain jurists were authenticated under his seal, and thus became law. These jurists, whose unanimous opinion made law, became an established institution. Some of these men advised the emperors as to legislation, and as to other matters of law submitted to them directly or by appeal. Septimus Severus, utilizing his authority to subordinate the civil to the military power, appointed Papinian, the greatest of all Roman jurists, as *praetorian prefect*—which gave him power over both the army and the law, and he, in turn, was succeeded by Ulpian and Paulus. These jurists wrote authoritative treatises on the law, which came to have as much weight as authority as their opinions, which were ultimately responsible for the systematization of Roman jurisprudence. Utilizing the law contained in the twelve tables, the edictal law and established custom, they devoted themselves to building up the law to such an extent and so effectively that the writings of Papinian, Paulus, Gaius, Ulpian and Modestinus, were by imperial fiat declared to have the force of law, when they were unanimous; if not unanimous, the majority opinion was to prevail; if equally divided, the opinion with which Papinian concurred was to be adopted. Thus, through the efforts of the first two great praetors, and through the writings of the great jurists, there emerged from the narrow rules which developed out of the early peculiarities of Roman society, a system of broad general principles which gradually expanded into a system of justice designed for universal dominion, and to serve as the common law of all the provinces.

The jurists, being imperialists, by their opinions supported "the imperial authority at all points of doctrinal application and adminis-

trative contact between it and the law."[60] Remembering the republic and the right of revolution, these jurists sought to justify the Roman Emperor on some legal theory—to wit, that the authority of the people had been irrevocably granted to the emperor, which was compared with the constitutional principle that whatever pleased the prince had the force of law. In this way, the jurisprudence which had been recast in an imperial mold became a part of the imperial system. And the chief governmental officers of the empire were selected from the legal profession, they were indoctrinated with the principles of imperial policy, with the result that both the courts and the law were subordinated to imperial authority, thus paving the way for a perfect system of despotism disguised under the forms of law, and built up on the ruins of the republic. The open courts of the republic in both civil and criminal cases disappeared, and appeal lay only to the emperor.

After the division of the empire, Justinian, the Emperor, had all the constitutions which had been issued by the preceding rulers, organized into a code. Tribonian, a distinguished lawyer and one of the codifiers, was placed at the head of a commission, to make selections from the writings of the elder jurists, which selections were to serve as a compendious exposition of Roman law. After three years of labor this commission produced what are now known as the Pandects or Digest, containing literal extracts from thirty-nine jurists, but with the extracts from Ulpian and Paulus constituting about one half of the entire work. The Pandects were not only used by the practitioners, but were also designed to serve the purposes of legal education in the schools of jurisprudence at Constantinople and Berytus. Tribonian and Theophilus having been appointed as professors of law in these schools, produced the Institutes.

Thus, the Code, the Pandects or Digest and the Institutes came to contain the civil law which has been handed down to modern times, and it was this system which has been generally adopted and followed in the continental countries; it was also this system which, through the church, had its effect on the ecclesiastical law and on the development of equity in England. The latter developments in Roman law, therefore, exerted a greater influence upon our modern systems of law than the developments in the two earlier periods of Roman legal developments.

[60] See STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, *Introduction,* 8 (3d Am. ed. by Tyler, Washington, D. C. 1893).

It should be observed in retrospect says Professor Tyler, that Roman jurisprudence underwent several stages of development. Under Augustus two schools of reformers appeared, one in favor of adhering to the strict forms of the law under the republic, the other, in favor of substituting for them simple and general forms, better accommodated to the larger equity required by the enlightened spirit of the age. Labeo stood at the head of the Republican school, Capito at the head of the other. Capito, a time-server of the new order, advocated a change in both the forms and the spirit of legal procedure, whereas Labeo, favored adherence to the technical forms of procedure, believing that they alone guaranteed the protection of the rights of the citizen. This struggle continued for a full century, with the imperial party gradually gaining the upper hand, until, under Emperor Hadrian, by the use of the imperial edict, the reforming element acquired "uncontrolled legislative authority, and fixed forever the character of the imperial jurisprudence."[61] From this time on, the civil law and its procedure conformed to the praetorian form and spirit which had found ultimate expression in the Code, the Pandects and the Institutes of Justinian. The early forms of procedure of the republic, which emanated from the free spirit of the people, were now replaced by what appeared to be the simpler forms of procedure under the empire, thus making a so-called advance in Roman jurisprudence. In reality, however, the substance was exchanged for the form; the machinery for carrying the law into effect was confounded with the law itself. The substantive law was undoubtedly improved, but the mode of procedure for enforcing the rights and liabilities thereunder "was changed from one suited to the liberty of the citizen to one suited to arbitrary power, by enlarging the discretion of judges."[62] And it was this very development which explains why the countries of continental Europe have been governed by one tyranny after another, whereas, in England, where the judges were controlled by the law, and not left free to exercise their personal whims under the guise of legal discretion, the people have continually enjoyed a larger degree of freedom.

6. *The Continental System of Civil Procedure.*[63]—By the latter

[61] See STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, *Introduction,* 10 (3d Am. ed. by Tyler, Washington, D. C. 1893).

[62] *Ibid.*

[63] In general, on the continental system of civil procedure, see:

TREATISES: MILLAR, A HISTORY OF CONTINENTAL CIVIL PROCEDURE, Vol. 7 (1927)

part of the Period Under the Emperors, the Roman law had assumed a definite form in the Codes, the Pandects and the Institutes. These contained the civil law which was handed down to modern times, and it was this system of civil law which has been adopted in Continental Europe. In recent years, through the research efforts of a distinguished group of legal scholars, among whom Professor Robert W. Millar[64] is preeminent, we have learned some of the points of distinction between the continental and common law systems, particularly on the procedural side. The pleadings at common law, once oral, are now entirely written, whereas, although the early steps in continental pleading, such as the statement of the parties, and the grounds of demand, were written, the real pleadings, that is, those conducted before the open court, took the form of oral conclusions. One reason why so little emphasis is placed on written pleadings under the continental system of procedure may be due to the absence of trial by jury, which is one of the chief characteristics of the common-law system. Under such a system in which, as Professor Charles E. Clark accurately observes, little importance is attached to the "unfamiliar statements of the parties,"[65] it is understandable why decisions on points of pleading are infrequent.

7. *The Civil and Common-Law Systems of Pleading Compared.* —The Civil Law of ancient Rome and the Common Law of England, the two great systems which have significantly influenced modern civilization, have much in common, yet differ in certain fundamental respects. The common law differed from the Roman law with respect

of the Continental Legal History Series, containing a rich source of continental legal materials.

Articles: CLARK, S. S., *Individualism and Legal Procedure,* 14 Yale L. J. 263 (1905); BALDWIN, *The German Law-Suit Without Lawyers,* 8 Mich. L. Rev. 30 (1909); LEWINSKI, *Courts and Procedure in Germany,* 5 Ill. L. Rev. 193 (1910); BORCHARD, *Some Lessons from the Civil Law,* 64 U. of Pa. L. Rev. 570, 578 (1916); MILLAR, *The Formative Principles of Civil Procedure,* 18 Ill. L. Rev. 1, 94, 150 (1923); MILLAR, *The Recent Reforms in German Civil Procedure,* 10 A. B. A. J. 703 (1924); MILLAR, *Some Aspects of Civil Pleading Under Anglo-American and Continental Systems,* 12 A. B. A. J. 401 (1926); LE PAULLE, *Study in Comparative Civil Procedure,* 12 Cornell L. Q. 24 (1926); WRIGHT, *French and English Procedure: A Parallel,* 42 L. Q. Rev. 327 (1926); DENOYER, *Recent French Decrees, Modification of Procedure,* 18 J. Comp. Leg. & Int. L. 236 (1936); LOWENSTEIN, *Law in the Third Reich,* 45 Yale L. J. 779, 789 (1936); COHN, *New Regulations in the German Code of Civil Procedure,* 17 J. Comp. Leg. & Int. L. 72 (1935); SHARTEL AND WOLF, *Civil Justice in Germany,* 42 Mich. L. Rev. 863 (1944).

64 MILLAR, *The Formative Principles of Civil Procedure,* 18 Ill. L. Rev. 1, 94, 150 (1923).

65 CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, c. I, § 3, 10 (2d ed. St. Paul, 1947).

to administrative principles and forms of procedure. The principle which distinguishes the two systems is the relative obligatory force which is given under them to precedent or to former decisions. The former decision binds the common law court unconditionally on the same state of facts, it being deemed essential to follow a fixed rule of decision, in order to protect rights and property, and in order that a lawyer may, with some degree of accuracy, advise his client as to the state of the law. Under the civil law a prior decision has no fixed or binding operation; it merely governs the particular case and does not establish as a rule of law the principle developed therein. As the judge decides the case according to his own personal conception of justice, or that of some eminent jurist, in practical administration the civil law suffers from the uncertainty and fluctuation of doctrine which inevitably results from a failure to follow precedent. By contrast the only authority recognized at common law consists of the judgments of courts deliberately given in cases argued by the counsel of both parties and then decided by the judges, after the reading of briefs and extended discussion of the issues among themselves. According to Lord Coke,[66] the lawyer's opinion has no place in interpreting either common law or statute; only "the solemn voice of the law itself, speaking through its constituted tribunals, is of any judicial authority."[67] And it was this very stability of law, overriding the prerogatives of the English Crown, and thus making possible the rendition of justice to the high and the low, the rich and the poor, over a period of six hundred years, that has vindicated the "frame and ordinary course of the common law,"[68] and recommended its consideration to succeeding generations of free men.

The great superiority of the common over the civil law as a practical system of jurisprudence regulating the affairs of society is therefore due to the certainty as to rights and obligations which it guarantees, thus excluding private interpretations and administering a curb to the arbitrary discretion of judges. Fixed and certain principles of interpretation, early adopted, have never been abandoned, but have continued as precedents under which cases based on an identical factual situation are decided in the same way. Under the civil law, it is otherwise. In modern times the historical and philosophical schools

[66] See 9th Report, Preface (Dublin, 1792).

[67] STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, *Introduction,* 13 (3d Am. ed. by Tyler, Washington, D. C. 1893).

[68] *Id.* at 14.

of thought have introduced different principles of interpretation, which, when supported by the idea that former decisions are of no weight, has produced such uncertainty that a decision in the clearest case cannot be confidently forecast.

The difference between the administrative principles of the civil and common law is directly related to their different modes of procedure and with the different degree of respect paid to technical forms. When we come to trace the development of the common-law forms of actions we shall find that they were long regarded as being as sacred as the principles which they embodied. The right depended on the form and the form, being itself a precedent, made certain and fixed the principle which it embodied.

Special pleading was the great instrument by which the common law secured certainty in precedent, it being "the mainspring and regulative force of the whole [procedural] machinery of the common law"[69] by which every step in pleading, from the original writ to the final judgment, follows in logical and undeviating form and sequence, serving to give to the judgment of the court and the opinions of the judges, a very high degree of certainty as to the points of law involved, and to preserve a record of them as precedents for the guidance of future generations of clients, lawyers and judges.

As previously observed one of the functions of judicial procedure is to ascertain and to decide the issues of law or of fact in dispute between the parties. The modes for realizing upon this function of pleading were different under the common and civil law. Without the necessity of any participation by the court, the system of pleading as developed at common law was designed to produce the issues in dispute upon the common-law record, the parties being required to plead alternatively in writing until one side or the other demurred, thus raising an issue of law to be tried by the court, or entered a denial of the opposing allegations, thus raising an issue of fact to be tried by a jury, and terminating the pleading in one or the other event. Under the civil law mode of procedure, the parties are not required to develop upon the written record, by a process of alternate pleading, the issues of law or of fact in controversy. Contrary to the common-law rule they are permitted to set forth at large all the facts—ultimate facts, evidentiary facts, and even conclusions of law—which constitute the plaintiff's cause of action or the defendant's ground of de-

[69] *Id.* at 15.

fense, and without bothering to separate the issues of law from the issues of fact, as is required at common law. This practice arises out of the fact that the chancery or equity court is not dual in character, but consists of a single judge, generally unassisted by a jury, who is trained as a lawyer, and hence is able, unlike the jurors, to handle both separated and complicated issues of fact and of law. The entire case is thus "presented in gross to the court for its determination,"[70] leaving to it the laborious task of extracting from the complex allegations of the respective parties, the material issues at stake, and then organizing them in a form which will serve as an adequate basis for adjudication. This civil law mode of pleading, in which both questions of fact and of law were indiscriminately intermingled was inapplicable in the common law courts, whose dual character required a separation of law from fact, as a prerequisite to determining whether the trial was to be by court or jury. The very nature of the common law tribunal required a separation on the record, from the mass of complicated facts, the precise questions at issue, and this could only be accomplished in advance of the trial by experienced lawyers, skilled in the art of reducing all controversies to single, clear-cut, well-defined issues, and in seeing that these issues appeared upon the written record itself. As a result of this process of special pleading, by which the record of every case is stripped of all extraneous matters, of irrelevant and immaterial issues, leaving nothing but the naked questions of fact or of law for decision by the court or the jury, the administration of justice was greatly facilitated.

Without a distinct theory and law of evidence there can be no certainty in administrative justice. A clear definition of rights and liabilities goes for naught if, in judicial investigations, evidence is admitted which ought to be rejected, and evidence is rejected which ought to be admitted. The common-law pleading requirement of a single, clear-cut, well-defined issue of fact was designed so as to guide the judge in ruling on the relevancy of evidence, and it is in this particular that the common-law pleading system is vastly superior to that of the civil law. The statements in civil pleadings are so loose and vague that the issue in point is left in doubt, with the result that much evidence is admitted which is relevant to no particular issue. Moreover, under the common law, the evidence is heard by a jury, the insurance of which, in Anglo-Saxon countries, is a chief end of gov-

[70] *Id.* at 15, 16.

ernment; and it is special pleading which makes that peculiar procedural device work, presenting the precise points to be determined, and thereby indicating the character of the evidence required for proof.

Thus, it is that "common-law pleading gives certainty to trials at law, making the questions to be decided precise, the admission and rejection of evidence definite, and retaining on the record, after the trial, precision in everything, from the summons to the judgment, so that it can be known what was in dispute, what was proved, and what was adjudged."[71]

In closing the comparison of the two systems, perhaps a word should be included concerning their political aspects. As the civil law spread over the continent of Europe it carried with it its modes of procedure, and although the people of Europe originally had the same institutions as in England, nevertheless as the two groups of people descended the streams of time, the evidence of relationship gradually diminished and finally disappeared, with the result that political freedom was effaced in Europe, whereas, in England, at the same time there was a concurrent development of liberty and civilization. Whatever the source, the fact remains that the Anglo-Saxon and Anglo-Norman governments took a beneficent interest in the organization and development of courts, which, though emanating from the Crown, were interposed between the sovereign and his subjects, in such a way as to tend toward a limited monarchy. And it was the continuance of this tendency in English judicial and political life which finally secured to our ancestors a representative share in government, and made Parliament an organ of the people rather than of the Crown. In Europe, where the imperial law of Rome undermined the Teutonic institutions, it was the King who controlled the entire administration of justice. And the King's prerogative could not be resisted by the courts as in England, as the law and only the law it is, which can successfully resist the encroachments of despotism. As Tyler so well says: "In the absence of defined laws, and an independent judiciary to enforce them, the only check upon arbitrary power is popular insurrection; and the people, after they have overthrown by force one despotism, are liable, by their excess, as all history shows, to succumb to another."[72]

[71] *Id.* at 17.
[72] *Id.* at 19.

In the great contest between civil law and the Teutonic laws and institutions, which took place all over Europe after the fall of the Roman Empire, the Teutonic, under the Anglo-Saxon, prevailed in England, and at Runnymede and Marston Moor, King John was forced to sign Magna Carta, recognizing as fundamental rights of the people the principles of the common law. And soon thereafter, under the generative impulse of the common law, a representative system of government, composed of aristocracy, democracy, and monarchy was established; and it is this system so established which has served as a model for our form of government. Under it, as Bracton so early realized, has been vindicated the principle of the supremacy of the law over the King. During Edward I's reign (1272-1307) the foundations of the common law were securely laid. Then it was decided that the clergy, who favored the civil law, could no longer be permitted a monopoly of legal learning, for the "inns of court" were set up, where men could devote their lives to the study of the common law, and from this group Edward selected his judges. Under their guidance the principles of the common law and the modes of procedure were systematized; the courts were organized, and statutes which were enacted for reforming the law were framed with reference to the principles of Magna Carta and the common law.

And during the Elizabethan period of English history the character of English jurisprudence was fixed forever on the basis of the common law. Men like Lord Bacon and Lord Coke repudiated the civil law as inapplicable to the English polity, and from then on the common law has held to the direction then given to it, carrying within itself "an inherent force of expansion and progressiveness."[73] It consists of elementary principles capable of indefinite development in their applications to the ever-varying and increasing exigencies of society. "There are," declares Professor Tyler, "certain fundamental maxims belonging to it which are never departed from. These are the immutable basis of the system. There are other maxims which are restricted by modifications or limited by exceptions. It is pre-eminently a practical system. It has broken away from the shackles of theory and technicality when, in the changing conditions of society and of property, justice and expediency required it. For a time the ancient rules and practice may have resisted the equitable demands of the new exigencies in human life; but when the new exigencies have shown themselves to

[73] *Id.* at 21.

be permanent interests in society, English jurisprudence has always found within its acknowledged frame of justice means of providing for the new rights and obligations which have sprung from the ever-widening sphere of civilization. The method of its progress is simple and plain. When a case is brought into a court the first question which legitimately emerges from the facts is, whether there is any statute which provides for it. If there is none, then it is inquired whether there be any clear principle of common law which fixes the rights and obligations of the parties. If the answer be again in the negative, then springs up the inquiry, whether there be any principle of the common law which, by analogy or parity of reason, ought to govern. If from neither of these sources a principle of adjudication for the case can be educed, it is recognized as a new case, and the principles of natural justice are applied to its solution. But if the principles of natural justice, on account of any technical or other impediment, cannot be applied to the settlement of the respective rights of the parties, then, by the immutable juridical principles of the common law, founded upon the jealous limitation of judicial discretion, if equity cannot relieve, the case must fail; and provision can only be made by statute for future cases of like nature. It matters not how the civil law or other foreign jurisprudence may have disposed of the question, unless, upon one of the principles which have been stated, the case can be adjudged, the party must fail of relief who seeks the aid of a court. 'The Roman law,' said Tindal, C. J., in *Acton* v. *Blundell*,[74] 'forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground-work of the municipal law of most of the countries in Europe.'

"Upon such principles has the common law based its practice and developed its science. From first to last, through the courts at Westminster, the common law has resisted the introduction of the civil law into the jurisprudence of England. At the very time that the Tudors and the Stuarts were grasping at high prerogative the common law was maturing its vigor in the courts. Coke, one of their judges, did more to develop and organize it for protecting the individual

[74] 12 M. & W. 324, 351, 152 Eng. Rep. 1223, 1234 (1843).

against arbitrary power than any man who has appeared in the progress of English society. In him the professional instinct of the common law judge reached its sublimest sense of human right. He saw that the English constitution draws its whole life from the common law, and is but the frame-work of its living spirit. By the common law 'every man's house is called his castle. Why? Because it is surrounded by a moat or defended by a wall? No! It may be a straw-built hut; the wind may whistle through it, the rain may enter it, but the king cannot.'

"In all the various revolutions, with their dark and dreary scenes of violence and bloodshed, through which England has passed, the people have clung to their ancient laws with a devotion almost superstitious. When our forefathers established governments in America they laid their foundations on the common law. And when difficulties grew up between them and the mother country, they acted as their English ancestors had always acted in their political troubles—interposed the common law as the shield against arbitrary power. When the United Colonies met in Congress, in 1774, they claimed the common law of England as a branch of those 'indubitable rights and liberties to which the respective colonies are entitled.' And the common law, like a silent providence is still the preserver of our liberties."[75]*

[75] STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS, *Introduction,* 23 (3d Am. ed. by Tyler, Washington, D. C. 1893).

* DEAN REPPY'S article will be concluded in the April issue of the NEW YORK LAW FORUM.